

APPEAL NO. 050239
FILED MARCH 17, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing (CCH) was held on January 19, 2005. In case number (Docket No. 1), the hearing officer determined that: (1) the appellant/cross-respondent's (claimant) compensable injury of (date of injury No. 1), includes lumbar disc pathology and/or lumbar sprain/strain after (date of injury No. 2); and (2) the claimant's compensable injury of (date of injury No. 1), includes depression, but does not include post-traumatic stress disorder (PTSD).

In case number (Docket No. 2), the hearing officer determined that: (1) the claimant sustained a compensable injury on (date of injury No. 2); (2) that the compensable injury of (date of injury No. 2), includes major depression and PTSD, but does not include lumbar disc pathology; and (3) Respondent 2 (carrier 2) did not waive the right to dispute the compensability of the claimed injury by not contesting the injury in accordance with Section 409.021.

The claimant appealed that portion of the extent-of-injury determinations that relate to the lumbar spine with regard to Docket Nos. 1 and 2. In addition, the claimant asserts that the hearing officer failed to make a determination on the disability issue in Docket No. 2.

Respondent 1/cross-appellant (carrier 1) appealed both extent-of-injury determinations in Docket No. 1 and that portion of the extent-of-injury determination that relates to the lumbar spine in Docket No. 2. Additionally, carrier 1 asserts that the hearing officer failed to make a determination on whether the claimant had disability resulting from the (date of injury No. 2), injury in Docket No. 2.

Both the claimant and carrier 1 filed a response. The appeal file does not contain a response from carrier 2.

DECISION

Affirmed in part and reversed and remanded in part, in Docket No. 1.
Affirmed in part and reversed and remanded in part, in Docket No. 2.

FACTUAL STATEMENT

The claimant was employed at a video store when she sustained two separate injuries on (date of injury No. 1), and (date of injury No. 2). With regard to Docket No. 1, the claimant testified that on (date of injury No. 1), she sustained an injury to her back when she attempted to catch a heavy gumball machine from falling to the ground. The parties stipulated that the claimant sustained an injury to her lumbar spine on (date of

injury No. 1). The claimant testified that she was off work for one month due to her back injury. At issue was whether the claimant's compensable injury of (date of injury No. 1), included lumbar disc pathology and/or lumbar sprain/strain after (date of injury No. 2), and whether the claimant's compensable injury of (date of injury No. 1), includes depression and/or PTSD.

With regard to Docket No. 2, the claimant testified that on (date of injury No. 2), the video store was robbed at gunpoint and that she was told to lie on the floor. The claimant testified that she was on her hands and knees, and that one of the robbers tripped over her and kneed her in the back as he attempted to leave the video store. The parties stipulated that the claimant sustained a compensable injury in the form of PTSD on (date of injury No. 2). The claimant testified that she sustained a new injury to her back on (date of injury No. 2), because her back pain was different from the back pain she experienced from her injury on (date of injury No. 1). The claimant testified that she has not worked since (date of injury No. 2), due to her back injury. At issue were whether the claimant sustained a compensable injury on or about (date of injury No. 2), and whether the compensable injury includes PTSD, major depression and lumbar disc pathology. Review of the record reflects that the parties withdrew the carrier waiver issue, however, the hearing officer made a carrier waiver finding of fact and conclusion of law. This issue was not appealed and has become final pursuant to Section 410.169.

Docket No. 1

Both the claimant and carrier 1 appealed that portion of the hearing officer's extent-of-injury determination that the compensable injury of (date of injury No. 1), includes lumbar disc pathology and/or lumbar sprain/strain after (date of injury No. 2). The claimant essentially asserts that because the hearing officer's determination contains the language "and/or" it implies that the issue remained unresolved. The hearing officer's Conclusion of Law No. 3 and the decision state that "[t]he Claimant's compensable injury of (date of injury No. 1), includes lumbar disc [pathology] **and/or** a lumbar sprain/strain after (date of injury No. 2)." [Emphasis added.] However, the hearing officer's order states "Carrier 1 is ordered to pay benefits relating to Claimant's lumbar disc pathology **and** lumbar sprain/strain. [Emphasis added.] We note that the hearing officer did not make a finding of fact regarding whether the compensable injury of (date of injury No. 1), includes disc pathology and/or a lumbar sprain/strain after (date of injury No. 2), and that it is not clear from the hearing officer's Background Information whether he determined that the compensable injury of (date of injury No. 1), includes both lumbar disc pathology and lumbar sprain/strain or either one. Because the hearing officer included the "and/or" language in his decision, it is unclear whether the hearing officer determined that the claimant's compensable injury of (date of injury No. 1), includes both the lumbar disc pathology and lumbar sprain/strain or either one. Accordingly, we remand the extent-of-injury determination regarding the lumbar spine for the hearing officer to determine whether the claimant's compensable injury of (date of injury No. 1), includes both lumbar disc pathology and lumbar sprain/strain or either one.

Carrier 1 appeals the hearing officer's extent-of-injury determination with regard to depression. We have reviewed the complained-of determination regarding extent of injury and conclude that the issue involved a fact question for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Docket No. 2

The claimant and carrier 1 appealed the hearing officer's extent-of-injury determination with regard to the lumbar spine. The hearing officer commented that the evidence established that no further injury to the claimant's lumbar spine resulted from the compensable injury of (date of injury No. 2). The hearing officer found that the claimant's compensable injury of (date of injury No. 2), neither caused, or by way of aggravation, enhanced the claimant's preexisting lumbar disc pathology. Extent of injury is a question of fact for the hearing officer to resolve. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, supra. Applying this standard, we find sufficient evidence in the record to support the decision of the hearing officer. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

With regard to disability, the claimant and carrier 1 both assert that the hearing officer failed to make a finding of fact and conclusion of law regarding disability. Review of the record reflects that the benefit review conference report references a disability issue and that the parties agreed to add the issue of disability at the CCH. We must remand this case for findings of fact and conclusions of law regarding disability. On remand, the hearing officer should determine whether the claimant had disability resulting from a compensable injury on (date of injury No. 2), and if so, for what period(s).

We affirm the hearing officer's decision that the claimant's compensable injury of (date of injury No. 1), includes depression, but does not include PTSD, and we reverse and remand for the hearing officer to make findings of fact and conclusions of law on

the issue of whether the claimant's compensable injury of (date of injury No. 1), includes lumbar disc pathology and/or lumbar sprain/strain, and to determine whether both conditions or just one of them, and if one, which one, is included, in Docket No. 1.

We affirm the hearing officer's extent-of-injury determinations and reverse and remand in part for the hearing officer to make findings of fact and conclusions of law on the issue of whether the claimant had disability resulting from a compensable injury of (date of injury No. 2), in Docket No. 2.

Pending resolution of the remand concerning disability, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of insurance carrier 1 is **EMPLOYERS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**HOWARD ORLA DUGGER
2505 NORTH PLANO ROAD, SUITE 2000
RICHARDSON, TEXAS 75082.**

The true corporate name of insurance carrier 2 is **ST. PAUL FIRE AND MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge